



**EPA Region 10 RTOC**  
**Regional Tribal Operations Committee**  
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April 21, 2016

Becca Conklin  
Washington Department of Ecology  
PO Box 47600  
Olympia, WA 98503-7600

Submitted via email ([swqs@ecv.wa.gov](mailto:swqs@ecv.wa.gov))

**RE: Comments of Region 10 RTOC Tribal Caucus on the Draft Water Quality Standards for Protecting Human Health**

Dear Mr. Conklin:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee (RTOC). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. These comments are submitted on the Draft Water Quality Standards for Protecting Human Health ("draft standards").

The Clean Water Act requires states to develop water quality standards necessary to meet the requirements of the Clean Water Act, including protecting designated uses of water. 33 U.S.C. § 1313. Those designated uses encompass the "fishable and swimmable" protections of the Clean Water Act -- including protecting and cleaning up lakes and rivers so that they are clean enough for drinking, for direct human contact for fishing and recreation, for healthy aquatic resources, and for catching and consuming fish and shellfish.

The Region 10 RTOC includes Tribes across Alaska, Washington, Idaho, and Oregon. Many of these Tribes have called for changes to state water quality standards to adequately address subsistence use of resources by tribal communities, including fish, aquatic plants, and aquatic birds and mammals.

Clean water is essential to many Tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons, as well as a treaty-reserved right for many Tribes in the Northwest. The ability of Tribes to control pollution and protect water quality is vital to the survival of Tribes. Almost

no activity has more potential for significantly affecting the economic and political integrity and the health and welfare of all reservation citizens than water use, quality, and regulation.

The Tribal Caucus commends that the Washington Department of Ecology (“Ecology”) for changes to the draft standards that were made from the previous version, particularly adoption of a consumption rate of 175 grams per day with a cancer risk of one in one million. However, the draft standards fall short in protecting tribal health and meeting the goals of the Clean Water Act in making our waters “fishable.”

These specific concerns include:

**Toxics Standards for Mercury, PCBs, and Arsenic:** The draft standards are inadequate with regards to toxics, particularly mercury, PCBs, and arsenic. Instead of adopting more stringent standards for three of the most toxic pollutants, Ecology chose to leave the standards exactly the same as under the National Toxics Rule (“NTR”), with no steps forward despite a better fish consumption rate.

Ecology proposes to use a dramatically lower cancer risk rate for PCBs—rather than one in one million, it proposes one in 25,000 cancer risk for PCBs alone without explained why cancer risk originating from PCBs is less concerning than cancer risk for other chemicals such that it would allow a forty times greater risk. It is not clear what justification exists for this disparity in treatment. As Ecology knows, PCBs are still introduced into the environment from products such as yellow pigments, hydroseed, and other commercially available products. The State could certainly address these products through products bans (such as the state-enacted PBDE ban).

Moreover, the State is already address a much more stringent PCB limit on the Spokane River, where dischargers will be expected to meet a PCB limit based upon the Spokane Tribe’s fish consumption rate of over 700 grams/day.

Likewise, for mercury applying a revised fish consumption rate and the proper factors from EPA’s EFH recommendations would have resulted in a more protective water quality standard. Instead, Ecology simply proposes to put off any new regulation and will leave the current mercury standard as is. To justify its action, Ecology asserts it is simply too difficult to complete a mercury standard at this time. This assertion that it is too difficult is not a legitimate basis for failing to adopt a proper standard (particularly given that EPA has proposed a mercury limit for Washington).

For arsenic, the draft standards propose a 555-fold increase in the permitted amount of arsenic in fresh water. This is justified by citing the higher concentrations of arsenic in the Region. The draft standards suggest that adopting the “drinking water standard,” meets the State’s Clean Water Act obligations. This is incorrect. EPA has directly addressed this issue and has made plain that Safe Drinking Water Act (“SDWA”) standards are not to be used as a substitute for Clean Water Act section 304(a)(1) human health standards.

Getting these standards correct is an important environmental justice issue. All of these toxics bio-accumulate and bio-magnify in the food chain in such a way that makes fish problematic to consume. The standards for PCBs are still exceeded in some fish and statewide mercury advisory remains in place making their consumption extremely problematic for pregnant women, children, and tribal members

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who for cultural and economic reasons consume far more than the recommended allowance. Currently, EPA has proposed standards for these toxics that are more protective. The Tribal Caucus believes these standards should be adopted.

**Compliance Schedules:** The draft standards allow a significant increase in timeframes for compliance schedules, which is unacceptable.

Compliance schedules are recognized by EPA as a tool in permitting under some circumstances. 40 C.F.R. § 122.47. Compliance schedules are appropriate where an existing permittee needs time to comply with a new standard such as a new water quality standard or a new technology standard or both.

Ecology already provide for the use of compliance plans in permitting. The justification for compliance schedules is that compliance with a new standard cannot happen instantly, and so a plan may be created that includes interim, enforceable milestones with a firm date by which time permit requirements must be met.

While EPA does not set a maximum allowable time for compliance schedules, they must ensure compliance “as soon as possible.” 40 C.F.R. § 122.47(a)(1). Courts have indicates that these schedules cannot exceed the five-year term of a permit. *See Citizens for a Better Environment v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1120 (9<sup>th</sup> Cir. 1996). Further, “schedule of compliance” as defined in the Clean Water Act plainly contemplates a period of time constrained by the four corners of a five-year permit. *See* 33 U.S.C. § 1362(17)...

The draft standards uses vague language “as soon as possible” when refereeing to must meeting water quality standards, which is contrary to the law and threatens to result in a perpetual delay in compliance. The draft standards must require specific timeframes to meet standards to ensure accountability that our waters are clean.

**Variance:** The increased availability and/or potential use of variances in the draft standards are unacceptable. The variances proposed here will result in significant delays in improvement of water quality.

The draft standards should result in significant reductions of discharge of health impacting pollutants from point source – not efforts by the State to delay improvement to the health of our waters, fish, and people.

**Intake Credits:** The draft standards should eliminate the proposal for intake credits. Intake credits allow a polluter to discharge water that violates water quality limits if the discharger has not added pollutants to the water.

While conceptually good, intake credits are difficult when dealing with toxics. Many toxics, such as PCBs, accumulate in fish tissue and water over time such that even small additions are harmful. Allowing intake credits could weaken the ability to eliminate toxics and would contribute to and/or perpetuate the death by a thousand cuts problem of bioaccumulation that Washington is currently experiencing with these pollutants.

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If intake credits will be included in the final standards, Ecology must address potential impacts from bioaccumulation and develop incentives to capture all pollutants coming through the systems that end up in our waters.

The Tribal Caucus has previously indicated strong support for adoption of the proposed standards by EPA. Accordingly, we urge Ecology to revise its proposal to more closely mirror the proposal of EPA or to simply defer adoption to EPA.

The RTOC appreciates your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "William (Billy) J. Maines". The signature is written in a cursive, slightly slanted style.

William (Billy) J. Maines  
Region 10 RTOC, Tribal Caucus Co-chair